Filed 2/1/19 P. v. John CA2/1

**TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>HAYDEN OTHELLO JOHN,<br><br>Defendant and Appellant. | B287947<br><br>(Los Angeles County Super. Ct. No. MA071662) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Christopher Estes, Judge. Affirmed.

William Holzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey, and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

---

A jury convicted Hayden Othello John of one count of first degree residential burglary (Pen. Code, § 459) and he was sentenced to four years in state prison. On appeal, John contends the trial court erred in excluding a 911 call, and that the trial court's error rose to the level of a due process violation.

We discern no error in the trial court's ruling, and affirm.

## FACTUAL BACKGROUND

P.S. lived in an apartment above W.H. and K.H. On the morning of June 28, 2017, W.H. and K.H. heard an unusual amount of noise coming from the upstairs unit where P.S. lived. They looked for P.S.'s car but found her parking space empty.

W.H. and K.H. went upstairs and saw that P.S.'s front door and window were open. They heard noises emanating from the apartment and W.H. banged on the open door. Five seconds later, John came into view. W.H. and K.H. recognized John as a resident of the apartment complex, where he was known as "Trinidad."[1]

W.H. slammed the door and ran downstairs with K.H. As K.H. headed towards their apartment door, W.H. hid himself in a corner of the building.

John ran down the stairs past W.H. and K.H. W.H. tried to grab John, but missed, and K.H. chased John a short distance. K.H. saw John get into the passenger side of an old Honda Accord that drove away.

W.H. asked his neighbor, Ms. G. (the neighbor), to call 911. Afterward, W.H. and K.H. spoke with the apartment building manager, B.T. (the manager). Based on information obtained from

---

[1] John was born in Trinidad and Tobago.

K.H., the manager obtained a picture of John.[2] W.H. and K.H. recognized him as the burglar.[3] Two weeks later, Deputy Candice Bevins showed W.H. and K.H. a six-pack photographic lineup; they both identified John as the burglar.

When P.S. returned to her apartment after the burglary, she discovered that her home had been ransacked. Money, jewelry, and a laptop were missing from her residence. John did not have permission to be inside her apartment.

**Defense Evidence**

On the day of the burglary, Deputy Chantelle Telles obtained a photograph of John from the manager and showed it to W.H. and K.H. Deputy Telles asked if they recognized the person in the photograph as the burglar. They replied "no," although they stated they were unsure. They did not mention the burglar's nickname was "Trinidad."

---

[2] K.H. first spoke with the manager at her office, at which time the manager pulled a picture of John from his lease application; the manager and another staff member of the apartment building subsequently spoke with W.H. and showed him the photograph also.

[3] W.H. and K.H. each testified they recognized the photograph of John pulled by the manager. The manager provided no testimony on the identification of the photograph, but testified that she selected the photograph based on information provided by K.H.

## DISCUSSION

At trial, the defense sought to introduce the 911 call made by the neighbor. Defense counsel stated both W.H. and K.H. testified they told the neighbor the identity of the burglar and heard the neighbor relay that information to the 911 operator. To rebut this testimony, defense counsel proffered a portion of the 911 call: "One of the first questions that the 911 operator asked was, 'Do you know the person who did this?' You hear the caller and the neighbor turn and say, 'Do you know who did this?' [¶] And [M.H and K.H.] say something—you can't hear exactly what they are saying—but [the neighbor] turns and says, 'No, they don't know who it is.' " Defense counsel argued the call was admissible as impeachment evidence and a spontaneous declaration.

After listening to a recording of the 911 call, the trial court ruled it inadmissible stating, "During the course of the call, [the neighbor] is, as I said, relying or relaying information from the third party. She is also providing information of her own. [¶] She indicated at some point she made certain observations of the alleged suspect that was involved in the alleged burglary. [¶] *You cannot tell who [the neighbor] is speaking to. I cannot tell if she's speaking to [W.H., K.H.], or both of them.* [¶] . . . *[G]iven the issues that are being raised here in terms of the levels of hearsay, the inability to identify who, in fact, that third party was, who may have been relaying the information to [the neighbor]—[the neighbor] would be the logical witness to call to be able to explain the context of the phone call* and who she was speaking to, what was being said by that individual, and at what point. [¶] . . . [¶] *The court's concerned about the multiple levels of hearsay, the lack of trustworthiness, and not having a witness available for cross examination.* [¶] So looking

at the totality of the circumstances, the court does not believe it would be appropriate to allow the 911 call in." (Italics added.)

### A. *Relevant Law and Standard of Review*

Under the hearsay rule, evidence of an out-of-court statement offered for its truth is inadmissible unless there is an applicable exception to the rule. (Evid. Code, § 1200.)

Impeachment evidence, through prior inconsistent statements, is one exception to the hearsay rule. (Evid. Code, § 1235.) To establish the applicability of this exception, the proponent of the hearsay statement must establish: (1) The prior statement is inconsistent with a witness's testimony in court; and (2) The statement is offered in compliance with Evidence Code section 770, which requires the witness be given the chance to explain or deny the statement. (Evid. Code, §§ 770, 1235; *People v. Avila* (2006) 38 Cal.4th 491, 579–580.)

Spontaneous statements, made under the stress of excitement, are another exception. (Evid. Code, § 1235.) To establish the applicability of this exception, the proponent of the hearsay statement must establish: (1) The statement purports to narrate, describe, or explain an act or condition perceived by declarant; and (2) The statement was made while the declarant was under the stress of excitement caused by his or her perception of the event. (*Ibid.*; *People v. Gutierrez* (2009) 45 Cal.4th 789, 809–810.)

The principle permitting admission of multiple hearsay turns on whether all layers fall within an exception to the hearsay rule. (Evid. Code, § 1201; *Cruey v. Gannett Co.* (1998) 64 Cal.App.4th 356, 366; *People v. Williams* (1997) 16 Cal.4th 153, 199, fn. 3.)

We review a trial court's determination as to the admissibility of evidence, including the application of the exceptions to the hearsay rule, for an abuse of discretion. (*People v. Rowland* (1992)

4 Cal.4th 238, 264.) Under this standard, a trial court's ruling will not be disturbed unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.)

### B. *Exclusion of 911 Call*

John contends the trial court's exclusion of the 911 call was erroneous under the evidentiary hearsay rules and further violated his federal constitutional rights. We disagree.

The proffered 911 call involved two levels of hearsay: (1) The statements made by a third party (or third parties) to the neighbor; and (2) The statements made by the neighbor to the 911 dispatcher. Assuming, without deciding, that John sufficiently cleared the first hurdle—under the impeachment or spontaneous declaration exception—he failed to clear the second.[4]

John does not contend the neighbor's statements to the 911 dispatcher qualified for any hearsay exception, but instead

---

[4] We note, however, that the testimony of W.H. and K.H. was not as clear-cut as represented by defense counsel before the trial court. Defense counsel, in arguing the issue of impeachment, told the trial court that both W.H. and K.H. unequivocally testified they told the neighbor the identity of the burglar and heard that information relayed to the 911 operator.

W.H. testified, however, that he mentioned to the neighbor that he had seen the burglar around the area before, but didn't hear the neighbor relay that to the 911 operator. K.H. testified she arrived late to the 911 call—after chasing John—and did not hear all that the neighbor told the operator. On cross-examination, K.H. denied telling the neighbor she didn't know who committed the burglary, but agreed she heard the neighbor say it was "the guy in the complex."

argues the neighbor was merely an unbiased relay or "conduit" and, as such, interposed no additional layer of hearsay. In so arguing, John relies on the "language conduit" theory recognized in *Correa v. Superior Court* (2002) 27 Cal.4th 444, 448 (*Correa*).

In *Correa*, our Supreme Court held that the participation of a translator in an out-of-court interview does not interpose a layer of hearsay. "Rather, a generally unbiased and adequately skilled translator simply serves as a 'language conduit,' so that the translated statement is considered to be the statement of the original declarant, and not that of the translator." (*Correa*, *supra*, 27 Cal.4th at p. 448.) The court adopted the Ninth Circuit's approach in *U.S. v. Nazemian* (9th Cir. 1991) 948 F.2d 522, 527. That approach includes consideration of several factors, " 'such as which party supplied the interpreter, whether the interpreter had any motive to mislead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated.' " (*Correa*, *supra*, 27 Cal.4th at p. 458.)

John argues the language conduit exception is "especially strong" in this case because the neighbor "was not translating a different language," thereby obviating any of the concerns regarding translator qualifications and language skills. However, John's apparent ability to breeze through the *Correa* factors is not due to the strength of his argument, but his reliance on a theory which, here, does not apply.

The reason for the language conduit exception is that a qualified language interpreter (like a certified court reporter) is trained to remove themselves from the equation and operate as a pure conduit or agent of the declarant. Absent such formal—or verifiable—qualifications, additional assurances of trustworthiness are required. (See *Correa*, *supra*, 27 Cal.4th at p. 459.)

Absent *any* translator relationship, however, the proffered declaration is, by default, a classic multiple-hearsay scenario. To argue otherwise by noting that the second declarant spoke with the blessing of the first, is nothing more than an attempt to circumvent the requirement that each and every level of hearsay must fall within a *recognized* exception. (Evid. Code, § 1201; *In re Cindy L.* (1997) 17 Cal.4th 15, 27 [explaining that rule barring hearsay is of "venerable common law pedigree," and that California, unlike some other jurisdictions, does not have a "residual hearsay" exception]; *Kulshrestha v. First Union Commercial Corp*. (2004) 33 Cal.4th 601, 608–609 (*Kulshrestha*) ["[h]earsay evidence is generally . . . inadmissible without statutory or decisional authorization"].)

The bar against multiple levels of hearsay is a necessary corollary to the rule because each new declarant brings the inherent risk associated with their statement—the inability to explain or clarify its meaning. Absent a recognized hearsay exception, the untrustworthy nature of the statement cannot be dispelled. (*Kulshrestha*, *supra*, 33 Cal.4th at p. 608 [trustworthiness of evidence and reliability of the fact-finding process rests on notion that persons who possess relevant information appear in court].) No such exception was presented here, while the foundational context was itself murky or ambiguous.[5] (Evid. Code, § 403, subd. (a).)

---

[5] This is apparent by the fact that the trial judge, who listened to the call, was unable to discern the gender of the third party with whom the neighbor interacted and/or whether she was speaking to a single individual or multiple persons.

We discern no error in the trial court's ruling, nor any violation of constitutional rights. (Evid. Code, § 1201; *People v. Ayala* (2000) 23 Cal.4th 225, 269 [criminal defendant does not have a federal constitutional right to present unreliable hearsay evidence].)

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

BENDIX, J.